In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1113

LAWRENCE B. GOLDSMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable the Associate Justices of the Supreme Court of the United States:

Petitioner, Lawrence B. Goldsmith, and four others, were charged with conspiracy and were convicted in the United States District Court for the Northern District of California, Southern Division. Each appealed to the United States Circuit Court of Appeals for the Ninth Circuit. In

proceedings in that Court, entitled and numbered "Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum, Appellants, vs. United States of America, Appellee," No. 11232, the conviction was affirmed by a divided court. Petitioner asks that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit to bring the cause here for review and determination as to him. He is advised that other defendants and appellants will ask that such writ issue and that such review and determination be had. In this behalf your petitioner respectfully shows:

I.

PROCEEDINGS BELOW AND JURISDICTION

1. The Grand Jury for the Northern District of California, Southern Division, returned an indictment charging that Lawrence B. Goldsmith and others (in violation of Crim. Cod. §37, 18 U.S.C.A. §88, the general conspiracy statute) did knowingly, etc. conspire etc. to commit the offense of knowingly etc. selling certain whiskey in excess of the maximum price of $25.27 per case established by law, in violation of 50 U.S.C.A. §§902(a), 904(a) and 925(b) and Office of Price Administration Regulations, and that in pursuance of such conspiracy the defendants committed specified overt acts in said division and district (R 3). Defendants pleaded not guilty (R 11), the cause was tried (Bill of Exceptions, R 238 etc.), defendants' motions for directed verdicts were denied, and the jury returned a verdict of guilty as to each defendant (R 31, 463, 464). On the next day, May 24, 1945, motions for new trial and in arrest of judgment were made and denied (R 42-47) and judgment was entered that petitioner be

imprisoned for two months and pay a fine of $1,000 (R 55). The jurisdiction of the District Court was rested on a charge of violation of the general conspiracy statute (Crim. Cod. §37, 18 U.S.C.A. §88) and on U. S. Const. Art. III, §2; U. S. Const. Amend. VI; Jud. Cod. §24 (28 U.S.C.A. §41(2)); 18 U.S.C.A. §546.

2. On the day that judgment was entered petitioner appealed (R 65). A stipulation and order in respect of exhibits was made on July 19, 1945 (R 467), petitioner served and filed his assignment of errors (R 205-238), a Bill of Exceptions was settled and filed (R 238-467), and the certified record (R 471) was filed and the cause docketed in the Circuit Court of Appeals for the Ninth Circuit on January 18, 1946 (R 472).

3. In the Circuit Court of Appeals the cause was heard and determined by Circuit Judges Denman, Healy and Bone. On December 16, 1946, that court affirmed the judgment (R 481; 158 or 159 F. 2d. .....; opinion set out in Appendix A). On January 14, 1946, and within the time allowed by the Rules of the Circuit Court of Appeals for the Ninth Circuit (Rule 25), petitioner served and filed a petition for rehearing (R 505). On February 28, 1947, the Court denied the petition but Circuit Judge Denman dissented, withdrew his concurrence in the opinion filed December 16, 1946, and filed a dissenting opinion on the merits in which he concluded that the judgment should be reversed (R 499; ..... F. 2d. .....; Appendix A). The jurisdiction of the Circuit Court of Appeals is sustained by the constitutional provisions above noticed and, Jud. Cod. §116 (28 U.S.C.A. §211); Jud. Cod. §128 (28 U.S.C.A. §225); 18 U.S.C.A. §688 (formerly 28 U.S.C.A. §723(a)) and Rule III of the Rules of Practice and Procedure in

Criminal Cases of May 7, 1934 (292 U.S. 661, App. IV, 78 L.ed. 1513).

4. Agreeably to Rule 37(b) of the Federal Rules of Criminal Procedure of 1946 (adopted pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688; 18 U.S.C.A. §687) and Rules 38 and 12 para. 1 of the rules of this Court this petition is filed. It is believed that the jurisdiction of this Court is sustained by the foregoing rules and U. S. Const. Art. III, Sec. 2 para. 2, and Jud. Cod. §240(a) as amended by Act of February 13, 1925 (28 U.S.C.A. §347(a)). (*United States v. Falcone*, 311 U.S. 205, 85 L.ed. 128; *Direct Sales Co. v. United States*, 319 U.S. 703, 87 L.ed. 1674; *Kotteakos v. United States*, 326 U.S. ....., 90 L.ed. (Adv. Op.) 1178; *Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876; *Fiswick v. United States*, ... U.S. ....., 91 L.ed. (Adv. Op.) 183.)

II.

SUMMARY STATEMENT OF THE MATTERS INVOLVED AND RULINGS

The substance of the indictments and the principal steps in the case have been set out above. The evidence showed:

Petitioner Goldsmith, doing business as Francisco Distributing Company at 122 Tenth Street, San Francisco, California, held a liquor wholesaler's basic permit (R 243-245). Nothing else appears as to this organization,—nothing as to the nature or size of its business or the character, number or functions of its employees, except that it did appear from the Harkins testimony, given below, that Weiss was sales manager and there was a

bookkeeper. It did not appear who actually handled for Francisco Distributing Company phases of the transactions here involved, or that petitioner Goldsmith had anything to do with any part of the transactions or, indeed, knew anything about them, except as we shall state affirmatively.

In December 1943 and January 1944 two carloads of whiskey, 4040 cases, arrived in San Francisco consigned to Francisco Distributing Company and physically handled for it through a warehouse. The whiskey was billed to Francisco Distributing Company and drafts for payment were sent to Bank of America. (R 251, 252, 257, 259, 263-268, 343, 344; U. S. Ex. 2, 3) The Bank notified Francisco, petitioner Goldsmith instructed the bank to pay the drafts and they were paid by being charged to the Francisco bank account (R 265-268, 343, 344).

All the whiskey, 4040 cases, was sold. It was shipped from the warehouse on orders given by Weiss to the warehouse (R 252-256). As required, proper records were kept and filed with the Government showing every purchase and sale by Francisco and, as to the sales of this whiskey, the name and address of every buyer (U. S. Ex. 2, 3;[1] R 246-249).

The cost to Francisco Distributing Company of the whiskey, delivered at San Francisco, was $21.97 per case. The O.P.A. ceiling price was fixed by multiplying this figure by 1.15. A ceiling of $25.27 per case resulted. Francisco, on the sales of this whiskey, invoiced and billed it out at $24.50 per case and received this amount and no more. This developed a gross profit of $2.53 per case (R 263-277, 387).

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1. Not printed. See stipulation, R 467.

Although the Government knew the name and address of every purchaser of the 4040 cases, it produced evidence of over-the-ceiling sales of only 1575 cases at most. It must be presumed that the remaining 2465 cases were properly sold at or under the ceiling price. The Government produced evidence of over-the-ceiling sales of 1575 cases by calling the purchasers. There were 13. Three dealt with and through another purchaser. Giometti dealt with Reinburg. Reinburg dealt with defendant Abel. Vakota and Lewis dealt with Cernusco. Cernusco dealt with an unknown man, who was in no way identified. The same is true of Figone, Vogel and Duffy. Taylor and Humes dealt with defendant Feigenbaum. Lombardi, Travis and Fingerhut dealt with defendant Blumenthal. None of the persons, identified or unidentified, with whom any of the buyers dealt, was Weiss or petitioner Goldsmith, or was shown to be connected in any way with Weiss or Goldsmith or Francisco Distributing Company. The transactions were handled in the following way:

The prospective buyer of whiskey was quoted a price by the person with whom he dealt. This price varied from $55 to $65 per case. He agreed to buy at this price. In due course he received the number of cases of whiskey wanted by him and a bill or invoice from Francisco Distributing Company showing the price of the whiskey as $24.50 per case. In each instance the buyer paid for the whiskey by giving a check made out to Francisco Distributing Company (except in one instance in which it was made out in blank) for the number of cases he was taking times $24.50 and making to the person with whom he dealt an additional payment in cash sufficient to bring his payment per case up to the price quoted to him. Francisco

Distributing Company received the $24.50 per case and no more. There was no evidence that it, or Goldsmith, or anyone else connected with Francisco Distributing Company had any knowledge of the price paid by the buyer or of these cash "side-payments."

This is the whole showing (the defendants offered no testimony) except for the testimony of the witness Harkins, a special investigator for the Alcohol Tax Unit. He testified, over objections, to conversations with petitioner Goldsmith, or in his presence, after the transactions were concluded; that it was stated that Francisco Distributing Company got $2.00 per case for clearing the whiskey through their books and that Goldsmith and Weiss divided this; that when petitioner Goldsmith was questioned "about who actually bought him the whiskey, who owned it," he said that Blumenthal brought it in and when asked if he knew of his own knowledge said "no"; that Goldsmith said that certain of the invoices were in his handwriting; that Weiss was his sales manager.

This is all!

The statement just made as to what the evidence does and does not show is subject to all the weaknesses of any general negative statement. Its accuracy is readily verified, however. *There is no statement to the contrary in the majority opinion.* The court does not undertake to state any evidence but satisfies itself by saying merely that "there was evidence in this case from which the jury could properly have inferred beyond a reasonable doubt: * * *." Judge Denman, in his dissenting opinion, says:

> "Abel, Blumenthal and Feigenbaum are shown to have been black marketers and should have been prosecuted for selling whiskey at over ceiling prices. In-

stead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. Kotteakos v. United States, 328 U.S. ....., 90 L.ed. 1178, 1183.

The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called "common pool" of whiskey in the warehouse— a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

* * * * *

The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketers, Abel, Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less that there was any agreement with the three or any one of them for such prohibited sales." (R 500-503).

Our statement, and Judge Denman's, is confirmed by the Government's own summary of the evidence in its

brief in the Circuit Court of Appeals. Rather than attempt to summarize that evidence ourselves, for the purposes of this petition, we use the Government's own summary. It is attached as Appendix B to this petition and the supporting brief.

As each bit of evidence came in it was appropriately objected to by each of the defendants who was not, by that evidence itself, connected with the matter testified to. The trial court made a general ruling that the evidence be received only against the particular defendant who was tied in by it with the matter then being testified to (R 254, 255). At the close of all its evidence the Government moved to admit all of the evidence against all of the defendants. Each defendant fully objected stating his specific grounds of objection. As to evidence already in the objections were accompanied by motions to strike. The motion of the Government was granted and those of the defendants denied (R 390-421). The grounds of objection fully stated that as to each defendant the matters affecting the other defendants were irrelevant, without foundation, *res inter alios acta,* and there had been no proof of the corpus delicti. The Harkins testimony was admitted only against defendants Goldsmith and Weiss. To that testimony petitioner Goldsmith made the specific objection that no foundation was laid and there was no proof of any corpus delicti of the crime charged in the indictment. This objection was made at the time the evidence was offered (R 381) and, again, in arguing the objections to the Government's motion and the motion to strike (R 410. See also R 229 et seq., 422-424).

At the close of the Government's evidence (none of the defendants offered any evidence) each defendant moved for a directed verdict, stating in detail the grounds. The motions were denied (R 421-429). Among the grounds specified were insufficiency of evidence to support a verdict of guilty, that the offense charged had not been proved, that there had been failure to prove that any defendant was a party to any conspiracy; that the acts or declarations of any alleged co-conspirator were not brought home to any other defendant by knowledge, authorization or consent; that the only thing proved was a series of isolated transactions; that there was no independent proof of the corpus delicti and no evidence of any connection of petitioner with any conspiracy and no evidence touching petitioner except that he directed payments of the bank draft and the incompetent hearsay testimony of Harkins as to extra-judicial statements. The later proceedings have been outlined above.

III.

THE QUESTIONS PRESENTED AND THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The question of the sufficiency of the indictment was raised by motion in arrest of judgment. (R 43, 44). The other substantial questions were raised by objections to evidence, motions to strike evidence and the motion for a directed verdict. All raised substantially the same questions. The admissibility of evidence of acts and declarations of other defendants and unidentified negotiators is substantially a question of the sufficiency of the evidence

to show that petitioner was connected with these acts or declarations. (Cf. *Fiswick v. United States,* ..... U.S. ....., 91 L.ed. (Adv. Op.) 183, 67 S.Ct. 224). The objection to the Harkins testimony is substantially an objection to its sufficiency (*Warszower v. United States,* 312 U.S. 342, 347, 85 L.ed. 876, 880). Accordingly, these other questions can be stated in terms of sufficiency of the evidence to sustain a conviction. The questions thus presented, and the reasons relied on for allowance of the writ, are as follows:

1. Does the indictment state the offense of criminal conspiracy, i.e., violation of Criminal Code §37, 18 U.S. C.A. §88? Does not the Emergency Price Control Act (Appendix C hereto) so fully occupy the field when it itself makes it unlawful "for any person to sell or deliver any commodity * * * in violation of any regulation * * * *or to offer, solicit, attempt, or agree to do any of the foregoing*" that there is no room to charge a conspiracy under the general conspiracy statute when all of the acts charged as a violation of the conspiracy statute are specifically covered and denounced by the Emergency Price Control Act and by it made a misdemeanor only? The Circuit Court of Appeals held that the application of Emergency Price Control Act to the conduct charged did not exclude the operation of the general conspiracy statute and in so holding decided an important question of Federal law which has not been, but should be, settled by this Court. (Cf. A charge of conspiracy in restraint of trade states an offense under the Sherman Act not under the general conspiracy statute, *United States v. Kissel,* 218 U.S. 601, 606, 54 L.ed. 1168, 1178. Cf. also *Gebaidi v. United States,* 287 U.S. 112, 121, 122, 77 L.ed. 206, 211; *United States v. Zenli,* 137 F. 2d. 845 (C.C.A. 2).

2. Was there "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt" (*Mortensen v. United States*, 322 U.S. 369, 374, 88 L.ed. 1331, 1335[2]; *American Tobacco Co. v. United States*, 328 U.S. ....., 90 L.ed. (Adv. Op.) 1095, 1098 n. 4) that petitioner Goldsmith was guilty of the conspiracy charged or any conspiracy? Was not the evidence insufficient as a matter of law in the particulars now to be specified, each of which, for the reasons noticed, warrants the allowance of the writ?

(a) The evidence showed at most a series of independent and separate transactions, having no relation to each other in purpose or design and no element in common except that they involved black market sales of whiskey at about the same time. In holding that evidence of such separate transactions sustained the charge of a single conspiracy the court below decided a Federal question in a way probably in conflict with the applicable decision of this Court (*Kotteakos v. United States*, 326 U.S. ....., 90 L.ed. (Adv.Op.) 1178).

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2. The court recognized the usual rule as to the force of a jury finding and went on: "But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Cf. *Abrams v. United States*, 250 U.S. 616, 619, 63 L.ed. 1173, 1175, 40 S.Ct. 17."

United States v. Wise, 108 F.2d 379, 383 (C.C.A. 7), reversing as to defendant Wise, says: "While impressed by the rule which makes the jury the sole judge of the facts in criminal cases and even more impressed by the fact that the trial court did not set aside the verdict, as contrary to the evidence, we are nevertheless weighed with a responsibility which must be met, namely, of examining all the evidence to ascertain where there is substantial proof of Wise's participation in the alleged scheme to defraud." The court found none and, accordingly, reversed as to Wise.

(b) The evidence showed only independent and isolated acts and declarations of alleged co-conspiracy not brought home to this petitioner by knowledge, consent or authorization. In holding that such evidence was sufficient to sustain a conviction of this petitioner the court below decided a Federal question in a way probably in conflict with applicable decisions of this Court (*Kotteakos v. United States,* supra; *Fiswick v. United States,* ..... U.S. ....., 91 L.ed. (Adv.Op.) 183; *Glasser v. United States,* 315 U.S. 60, 86 L.ed. 680) and rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter (*Thomas v. United States,* 57 F. 2d. 1039 (C. C.A. 10); *United States v. Liss,* 137 F. 2d 995, 998 (C.C.A. 2, cert. den. 320 U.S. 773, 88 L.ed. 962); *Egan v. United States,* 137 F.2d 369, 378 (C.C.A. 8); *Wyatt v. United States,* 23 F. 2d. 791, (C.C.A. 3); *Young v. United States,* 48 F. 2d. 26 (C.C.A. 5).)

(c) The evidence showed no more than that petitioner, legitimately engaged in the business of a wholesaler of liquor, supplied liquor and as a result of conduct of other persons, unknown to him and unparticipated in by him, it was paid for at prices over the ceiling price. The court below in holding that this sustained a conviction of conspiracy decided a Federal question in a way probably in conflict with the applicable decisions of this Court (*United States v. Falcone,* 311 U.S. 205, 85 L.ed. 128; *Direct Sales Co. v. United States,* 319 U.S. 703, 87 L.ed. 1674) and rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter (*Bacon v. United States,* 127 F. 2d. 985 (C.C.A. 10); *Thomas v. United States,* supra; *Young v. United States,* supra; *United*

States v. Gerke, 125 F. 2d. 243, 246 (C.C.A. 3, cert. den. 316 U.S. 667, 86 L.ed. 1742); *Moss v. United States*, 132 F. 2d. 875, 879 (C.C.A. 6); *Goodman v. United States*, 128 F. 2d. 854 (C.C.A. 9); *Tingle v. United States*, 38 F. 2d. 573 (C.C.A. 8).)

(d) Assuming that the evidence warranted the inference of some conduct on the part of some person active in the business of Francisco Distributing Company making him a party to a conspiracy to sell whiskey at prices over the established ceiling, neither Francisco nor such unidentified person is a defendant. Petitioner is the defendant, "guilt with us remains individual and personal even as respects conspiracy" (*Kotteakos v. United States*, supra) and there is no showing that this petitioner participated in or had any knowledge of any such activity. In holding that evidence of activity under the name of Francisco is sufficient to show criminal responsibility of this petitioner the court below rendered a decision in conflict with established principles of criminal law and in conflict with decisions of other Circuit Courts of Appeals on the same matter (*Bacon v. United States*, supra; *United States v. Liss*, supra (holding as to Palmer); *United States v. Wise*, 108 F. 2d. 379, 383 (C.C.A. 7). Cf. *United States v. Food etc. Bureau*, 43 F. Supp. 966, 971; *Paschen v. United States*, 70 F. 2d. 491, 503 (C.C.A. 7); *People v. Armentrout*, 118 Cal. App. 761, 1 P. 2d. 556; *State v. Burns*, 215 Minn. 182, 9 N.W. 2d. 518).)

(e) At most, the evidence as to this petitioner was circumstantial, it failed to exclude the reasonable inference of innocence and was as consistent with innocence as with guilt. The court below in sustaining the conviction on such

evidence rendered a decision in conflict with other decisions of Circuit Courts of Appeals on the same matter (*Kassin v. United States*, 87 F.2d. 183, 184 (C.C.A. 5); *Dahly v. United States*, 50 F.2d. 37, 43 (C.C.A. 8); *Estep v. United States*, 140 F.2d. 40, 45 (C.C.A. 10); *United States v. Gerke*, supra; *Parnell v. United States*, 64 F.2d. 324, 329 (C.C.A. 10, on rehearing); *United States v. Bates*, 141 F.2d. 436 (C.C.A. 7, as to Smith); *Donovan v. United States*, 54 F.2d. 193, 195 (C.C.A. 3, as to Rossiter); *Tingle v. United States*, 38 F.2d. 573 (C.C.A. 8)). This holding, on evidence which left petitioner's knowledge in the realm of speculation and conjecture, is in conflict with other decisions of Circuit Courts of Appeals (*Center v. United States*, 96 F.2d. 127, 130 (C.C.A. 4); *Fulbright v. United States*, 91 F.2d. 210, 213 (C.C.A. 8); *Caringella v. United States*, 78 F.2d. 563 (C.C.A. 7); *Dowdy v. United States*, 46 F.2d. 417, 423 (C.C.A. 4)). These citations are by way of example and not exhaustive.

(f) The only evidence pointed to as warranting an inference of guilt on the part of this petitioner was the Harkins testimony of hearsay and extra-judicial statements attributed to petitioner. As to him, and as to the necessary elements to show his guilt—as to the corpus delicti of the crime with which he was charged—there was no independent prior proof or later corrobation. The holding of the court, necessarily relying on this Harkins testimony, with no independent prior proof of the corpus delicti or later corrobation, is in conflict with applicable decisions of this Court (*Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876; *Isaacs v. United States*, 159 U.S. 487, 40 L.ed. 229) and in conflict with decisions of other

Circuit Courts of Appeals on the same matter (*Tingle v. United States*, supra; *Cartello v. United States*, 93 F.2d. 412 (C.C.A. 8); *Pines v. United States*, 123 F.2d. 825, 829 (C.C.A. 8); *Hogg v. United States*, 53 F.2d. 967, 969 (C. C.A. 5, cert. den. 285 U.S. 556, 76 L.ed. 945); *Forte v. United States*, 94 F.2d. 236 (C.A. for Dist. Col.)[3]; *Tabor v. United States*, 152 F.2d. 254, 257 (C.C.A. 4)[4]; *Ercali v. United States*, 131 F.2d. 354 (C.A. for Dist. Col.); *Boeland v. United States*, 238 Fed. 259 (C.C.A. 4); *Gulotta v. United States*, 113 F.2d. 683 (C.C.A. 8).)

WHEREFORE, it is prayed that this Court issue its writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit and that the cause be brought here for review and determination.

Dated at San Francisco, California, March 21, 1947.

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3. Cited in the *Warszower Case* and said in the *Tabor Case* to contain a "full discussion."

4. Following the *Warszower Case*.

(SUPPORTING BRIEF AND APPENDICES FOLLOW)

Brief in Support of the Foregoing Petition

I.

OPINIONS BELOW, JURISDICTION AND STATEMENT OF THE CASE

The opinions below have not been officially reported. They probably will be reported in 158 F.2d or 159 F.2d. They will be found in the record at page 482 and following and in Appendix A to this petition and brief.

A statement of the grounds on which the jurisdiction of this Court is invoked is in paragraph 4 of Part I of the foregoing petition. It is not repeated but is here referred to.

A statement of the case is made in Part II of the foregoing petition. It is not repeated but is here referred to.

II.

SPECIFICATION OF ERRORS

It is intended to urge error in the rulings referred to in Part II of the foregoing petition and to argue the questions presented in Part III of the foregoing petition. The questions raised and intended to be urged will be found in this petitioner's Assignments of Error as follows:

1. Assignments I through VII (R 205-207) and XII (R 210) deal with the jurisdictional question whether the indictment, attempting to charge a conspiracy under the general conspiracy statute, stated an offense against the United States, i.e., whether operation of the general conspiracy statute was excluded by reason of the applicability of the Emergency Price Control Act.

2. Assignments VIII (R 207), XIII to XXXIII inclusive (R 210-233), and XL (R 237) assign error in rulings of the court in the admission of testimony and in refusing to strike out testimony and all raised the question of the sufficiency of the evidence to establish the corpus delicti, to connect petitioner with the acts and declarations of other persons and to permit use against him of asserted extra-judicial statements testified to by the witness Harkins.

3. Assignments IX to XII, inclusive (R 209, 210) deal with error in denying petitioner's motion for an instructed verdict and attack the sufficiency of the evidence to sustain a conviction, including the raising of the questions on motion for new trial and by motion in arrest of judgment.

III.

ARGUMENT

Proof required.

It is elementary that at least two people must confederate before there can be a conspiracy (*Morrison v. California*, 291 U.S. 82, 92, 78 L.ed. 664, 671[5]; *Gros v. United States*, 138 F.2d. 260, 263 (C.C.A. 9); *United States v. Fox*, 130 F.2d. 56, 57 (C.C.A. 3 cert. den. 317 U.S. 666, 87 L.ed. 535). Cf. *Gebardi v. United States*, 287 U.S. 112,

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5. "The joinder was something to be proved, for it was of the essence of the crime" (*Morrison v. California*, above). The crime of conspiracy is wholly distinct from the substantive crime which may be the object of an alleged confederation (*Braverman v. United States*, 317 U.S. 49, 54, 87 L.ed. 23, 28; *United States v. Rabinovich*, 238 U.S. 78, 59 L.ed. 1211; *United States v. Manton*, 107 F.2d 834, 838 (C.C.A. 2, cert. den. 309 U.S. 664, 84 L.ed. 1012)).

77 L.ed. 206). An agreement in some form is the essence and gravamen of the charge (*United States v. Falcone*, 311 U.S. 205, 210, 85 L.ed. 128, 132; *Braverman v. United States*, 317 U.S. 49, 53, 87 L.ed. 23, 28; *Lynch v. Magnavox Co.*, 94 F.2d. 883, 888 (C.C.A. 9); *Tingle v. United States*, 38 F.2d. 573 (C.C.A. 8); *Bacon v. United States*, 127 F.2d. 985, 986 (C.C.A. 10)).

Conspiracy is a crime of intent. (*Craig v. United States*, 81 F.2d. 816, 822 (C.C.A. 9, cert. dis. 298 U.S. 637, 80 L. ed. 1371 and den. 298 U.S. 690, 80 L.ed. 1408)). For intent there must be knowledge. "Those having no knowledge of the conspiracy are not conspirators". (*United States v. Falcone*, 311 U.S. 205, 210, 85 L.ed. 128, 132). "Without the knowledge the intent cannot exist" (*Direct Sales Co. v. United States*, 319 U.S. 703, 711, 87 L.ed. 1674, 1681)[6]. A person cannot join a conspiracy, in ignorance of its existence (*Lee v. United States*, 106 F.2d. 906 (C.C.A. 9)), and to be guilty must "share the guilty knowledge and design" (*Morrison v. California*, 291 U.S. 82, 93, 78 L.ed. 664, 672; *Estep v. United States*, 140 F.2d. 40, 45 (C.C.A. 10)).

While knowledge is a prerequisite, alone it is not enough. The line may be hard to fix but knowledge and

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6. The Court cites the *Falcone Case* and holds that strong suspicion will not take the place of knowledge (See Court's note 8). It further points out that even knowledge alone is not enough but in addition there must be intent and participation. Mere indifference will not do. "A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active inducement to purchase."

acquiescence are on one side and participation and active cooperation are on the other. (*Egan v. United States*, 137 F.2d. 369, 378 (C.C.A. 8); *Direct Sales Co. v. United States*, supra[6]; *United States v. Falcone*, supra; *Thomas v. United States*, 57 F.2d. 1039 (C.C.A. 10)).

Petitioner Goldsmith may have been a fool—"a sap and a sucker" and "just used" (R 386; see note 15 in Appendix B),—but *he* did not participate or actively cooperate in any scheme to sell over the ceiling and, "fortunately, looking back over mistakes which viewed from the rear seem stupid, it is nevertheless often true that eligibility to appropriate guardianship proceedings is not sufficient to establish participation in a crime where evil intent is an essential element" (*United States v. Wise*, 108 F.2d. 379 (C.C.A. 7). Cf. *Estep v. United States*, 140 F.2d. 40 (C.C.A. 10[7])).

One other preliminary: "Guilt with us remains individual and personal even as respects conspiracy" (*Kotteakos v. United States*, 326 U.S. ....., 90 L.ed. (Adv. Op.) 1178). This applies not only to responsibility for acts of strangers but as well to acts of those having the civil status of employees or agents. The rule of civil law that

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7. "'*Without the knowledge, the intent cannot exist.* • • • Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.' *Direct Sales Co. Inc. v. United States*, 319 U.S. 703, 63 S.Ct. 1265, 1269, 87 L.ed. 1674, decided June 14, 1943. See also *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.ed. 128. • • • *From the evidence it is as reasonable to conclude that Estep was victimized by Henry and Deluke, as that he was a conscious participator in the fraudulent scheme or the conspiracy.* We conclude that the verdict of the jury as to Estep is not supported by that degree of proof which we deem essential." (Italics ours)

a principal is liable for the acts of his agents does not apply to impose criminal responsibility on a principal in the absence of some participation by the principal *himself* in the alleged wrongful act. (22 C.J.S. 149 (*Criminal Law*, section 84a); *People v. Armentrout*, 118 Cal. App. 761, 1 Pac. 2d. 556, cited in *Paschen v. United States*, 70 F.2d. 491, 503 (C.C.A. 7th), which in turn is cited and relied on with other cases, in *United States v. Food etc. Bureau*, 43 F. Sup. 966, 971). The rule applies where the charge is conspiracy as well as in other criminal cases (*United States v. Food etc. Bureau*, supra; *Bacon v. United States*, 127 F.2d. 985 (C.C.A. 10); *United States v. Liss*, 137 F.2d. 995, 1000 (C.C.A. 3, cert. den. 320 U.S. 773, 88 L.ed. 462) —the holding as to Palmer; *United States v. Wise*, supra —holding as to Wise; *State v. Burns*, 215 Minn. 182, 9 NW 2d. 518 (a full discussion)).

The proof failed.

The wholesaler indicted as a party to the claimed scheme was *Lawrence D. Goldsmith.* He is a defendant. *"Francisco Distributing Company" is not a defendant.* As to Goldsmith, as distinguished from Francisco, including all that appears of his connection with and activity in, Francisco, this is the full showing[8]: A wholesaler's basic permit was issued to L. D. Goldsmith dba Francisco Distributing Company showing that Weiss had been a partner. Goldsmith visited a branch of the Bank of America in connection with the bringing to San Fran-

8. We again respectfully draw attention to Appendix B, the statement of the evidence in the Government's brief in the court below, so that our summary general statements may be tested.

cisco two carloads of whiskey and paid the drafts covering them. If, to this, there be added the Harkins hearsay, it further appears: Goldsmith made out some of the invoices for the whiskey at $24.50 per case to the buyers and divided $2.00 per case with Weiss. There is an attempt, based wholly on the Harkins hearsay, to intimate that Francisco Distributing Company did not own the whiskey involved,[9] but simply permitted someone else to use its facilities for which it was paid $2.00 per case.

Without the Harkins testimony it can not be inferred that Goldsmith knew anything except (1) that the whiskey was shipped to Francisco in California, (2) that he paid for it, (3) that it was sold and shipped out, and (4) that Francisco billed and was paid $24.50 per case. Even with the Harkins testimony there is no evidence that Goldsmith knew what Weiss or Blumenthal or Abel or Feigenbaum did, or that any of them or anyone else got over-ceiling payments. Neither the government in its brief nor the Court in its opinion makes any such statement.

The papers—exhibits in the case constituting the record evidence of the transactions—show that Francisco brought in two carloads of whiskey, billed and shipped to it, paid for the whiskey, sold it and shipped it out to customers, and invoiced it and received payment for it at $24.50 per

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9. The majority opinion says the whiskey was "recorded as purchased by Francisco, though exactly who owned the whiskey was not established." If this is accurate then the prosecution did *not* establish beyond a reasonable doubt that Francisco (or Goldsmith), the record owner and holder, did *not* own it. If non-ownership by Goldsmith is vital to the Government's case the Government had the burden of establishing the fact beyond a reasonable doubt. Merely to have the record silent—to have the fact not established—won't do.

case. Goldsmith claims that *as to him* these papers represent the whole transaction; that he did not know of, and he has no responsibility for, any conduct of Weiss, Blumenthal, Abel or Feigenbaum.

The government and the majority opinion, conceding that the record evidence shows as to Goldsmith nothing but legitimate transactions, piling claimed inference on claimed inference, and disregarding equally reasonable inferences pointing to innocence, take the position that this was merely window dressing; that behind this lay a scheme to bring the whiskey to California to be sold at over-the-ceiling prices. As to Goldsmith, the only circumstances claimed to support such inferences are (1) that it does not appear "exactly who owned the whiskey" (in which event the government has not made a case beyond a reasonable doubt that Goldsmith did not own it), (2) it was merely put through Francisco's books as a paper transaction to make an apparent record that it passed through the hands of a legitimate wholesaler and (3) for this service Francisco was paid $2 per case. From this the leap is made, over all gaps, to the conclusion that *Goldsmith* agreed, not separately with each of the other defendants, but with all of them, they then also agreeing among themselves, that the whiskey be sold by them at over-the-ceiling prices.

This conclusion is necessary to sustain the conviction. Each part of it is necessary. It must appear that Goldsmith agreed (1) not merely to use his facilities for some[10]

10. The charge is conspiracy, not to do some unspecified wrong, or to permit the Francisco facilities to be used for some undefined and unknown wrongful purpose, but to "sell at wholesale certain distilled spirits • • • in excess of and higher than

improper purpose but (2) that this purpose was the purpose charged, i.e., sales at over the ceiling prices [10] and (3) that this was a single agreement to which all defendants were parties. Nothing less will satisfy the *Falcone, Direct Sales, Kotteakos* and *Fiswick Cases.*

This much is clear: a seller, legitimately engaged in business, is not guilty of conspiracy because some person, to whom or through whom he sells the commodity in which he deals, illegally uses, or disposes of it. Nor is it enough that he may suspect that some illegal act is intended. His cooperation is necessary, and merely selling, with suspicion, does not constitute the necessary cooperation. We have cited the cases in Part III-2-(c) of the petition. Of these cases we respectfully direct attention to the *Falcone Case*, the *Direct Sales Case* (see note 6 above) and the *Bacon Case.*

That Abel, Feigenbaum and Blumenthal were blackmarketers, clearly guilty of violation of the Emergency Price Control Act, is, as to petitioner Goldsmith, utterly colorless so far as the charge against *him* is concerned. Yet the very fact of charging them altogether creates the risk that the obvious guilt of the others of their offense will be transferred to him and, without warrant, an inference of conspiracy drawn. This danger lies at the basis of the holding in *Kotteakos v. United States*, 326 U.S.

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the maximum price established by law." The specification of the substantive offense, "sufficient to identify the offense which the defendants conspired to commit," was essential to statement of the offense of conspiracy (U. S. Const., Amend't VI; *Wong Tai v. United States*, 273 U.S. 77, 81; 71 L.ed. 545, 548; *United States v. Eisenminger*, 16 F.2d 816; *United States v. Bopp*, 230 Fed. 723) and *this* indictment could not be sustained by a proof of a conspiracy to commit some different offense.

....., 90 L.ed. (Adv. Op.) 1178. (And compare *United States v. Liss*, 137 Fed. 2d 995, 998 (C.C.A. 2, cert. den. 320 U.S. 773, 88 L.ed. 962).) That the danger is real, and not fanciful, is demonstrated by the majority opinion in this case. If the temptation to lump the defendants, and treat them all together, without proper differentiation and without noticing how differently they were situated and acted, was too strong for even the majority of the Circuit Court of Appeals to resist, a jury should not be tempted.

It adds nothing to say, as the majority below said, that "the transaction was coherent, followed a consistent pattern, and extended over a relatively brief period of time." If there were no questions or suggestion or suspicion of illegality as to Francisco Distributing Company, in view of the pressing demand for whiskey, a disposition of only 2 carloads could not have extended over more than a relative brief period. Of necessity its business,—its disposition of this whiskey,—must follow a consistent pattern. And as to it, necessarily, the transactions were coherent. It was its business to dispose of whiskey in a relatively brief period, following its own consistent pattern of business of selling and invoicing at $24.50, shipping out and reporting the transactions to the Government. And the sale of its own whiskey could not have been anything but coherent. Nor is the fact that several individuals who knew that the whiskey was available negotiated to sell it at a price over the ceiling and used an obvious and ancient device,—a legitimate record transaction below the ceiling and a further cash side payment,—so unusual as to warrant an inference as to this petitioner. There is nothing so novel in the device as to suggest prearrange-

ment with anyone. The differences in the amount of cash side payments alone points to want of such prearrangement.[11] That several individuals separately follow an obvious pattern and use an old device in no way suggests agreement with anyone (Cf. *Keegan v. United States*, 325 U.S. 478, 492, 89 L.ed. 1745, 1753).

The majority leans, in part, on Harkin's testimony that Goldsmith said (or acquiesced in the statement) that Weiss was his sales manager and that he divided $2 per case with Weiss. What is sinister in this? This was their working arrangement on all business, at least where Weiss had a part in it (R 384). And the facts demonstrate that the profit was not $2 per case but was the difference between the cost $21.97 and the selling price of $24.50, or $2.53 per case.

Finally the majority leans on the Harkins testimony that it was said that it was not known who owned the whiskey and that Francisco simply cleared it through its books. It was not proper to rely on this testimony (see below). But assuming this for the moment, it is still insufficient to exclude this case from the rule announced in the *Falcone* and *Direct Sales Cases*. That cooperation *in the illegal design*,—and it must be cooperation *with knowledge*,— is necessary to bring a seller within the ambit of a claimed conspiracy for ultimate illegal disposition, is settled. And mere irregular or unusual business practice does not show this.

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11. And if this petitioner were party to a single conspiracy it is strange that this device was used on only 1575 of 4040 available cases.

The conviction can be sustained only by a pyramid of speculation.

Assuming everything that Harkins says, it still does not appear that Goldsmith, as distinguished from some unidentified person connected with Francisco Distributing Company, knew any of these facts *at the time the whiskey was procured and disposed of.* It does not appear that *he personally* knew of or participated in the transactions beyond ordering that the whiskey be paid for. It does not appear who in the Francisco organization acted in ordering the whiskey or in arranging for its sale. It was not shown how many employees there were, what their functions were, or how many buyers or salesmen were managed by salesmanager Weiss. It was not shown what Weiss himself was doing. This petitioner is not to be held on a criminal charge because some employee may have arranged for the use of the facilities of Francisco Distributing Company for some improper purpose, unknown to Goldsmith. Of the cases cited in the foregoing petition Part III-2-(d) we particularly call attention to *Bacon v. United States.* It presents a deadly parallel.

Assume that this petitioner did know that his facilities were to be used for the purpose of clearing through his books whiskey which he did not own and that for this he was to be paid $2. This does not warrant the conclusion of guilt. He is not charged with misuse of his liquor license. There is no claim that this would have been a violation of his license. It does not warrant any "inference" of wrong-doing or of knowledge of wrong-doing. Some person, such as the operator of a string of taverns who did not have a wholesale license, might have wanted to make use of Francisco's facilities to bring liquor to

California for the entirely legitimate purpose of selling it in taverns under the ceiling prices. But assume that knowledge of such circumstances would give rise to an "inference" that this petitioner could suspect that some illegal use of the whiskey was to be made. Still that cannot impute to him knowledge that this illegal use was *to sell it over the ceiling* or warrant an inference of agreement that his facilities be used for *this* purpose.[12] An inference or suspicion of some unspecified illegality not charged in *this* indictment does not satisfy the *Falcone* and *Direct Sales Cases*. The only inference that will do is one of knowledge of the precise illegal use intended *as charged in the indictment* (see note 10 above) and participation or cooperation in the scheme, for the purpose of furthering *that* object, and in a way that goes beyond merely supplying a commodity in the ordinary course of business.

If without evidence an "inference" can be drawn that this petitioner knew that his organization did not own the whiskey and was merely passing it through its records for a fixed fee, and if, on top of this, and without evidence, there can be piled the "inference" that from the facts so inferred this petitioner knew that the ultimate purpose was illegal, and if, from the facts so inferred by inference on inference, a third inference can be raised that this petitioner knew the precise illegality intended and that it was to dispose of the whiskey at a price over the ceiling price, still enough has not been guessed. This petitioner is charged as a conspirator, not as an aider and abettor of the substantive offense, which is a misdemeanor only (*Bacon v. United States*, supra, where the

12. See Note 10 above.

charge was conspiracy and it was held that the charge was not sustained, expressly notices this distinction). To sustain a charge of conspiracy a farther "inference" that this petitioner knew the identity of the persons who were going to make these over the ceiling sales must be heaped on the foundation of guess and speculation. There is no evidence of this. Yet without knowledge of the identity of these persons there could be no agreement and no conspiracy. This petitioner, without such knowledge, might aid unknown persons by supplying them with a commodity, but he could not so participate or so cooperate as to show an agreement or confederation. There is not the slightest evidence that this petitioner even knew of the existence of Abel, or Feigenbaum, or Blumenthal or any of the unidentified persons who were not Weiss but who went around representing themselves as Weiss.[13]

Even if all these "inferences" are heaped one upon the other, each resting on nothing more substantial than the inference which precedes it, there is still not enough. Even if knowledge of identity can be "inferred" another step must be taken and it must be inferred that this petitioner did, in fact, agree, conspire and confederate with *each* of the sellers. But this is not enough. This would show only a series of distinct conspiracies. *That is not the charge here.* The charge here is of a single conspiracy, and under the *Kotteakos Case,* 326 U.S. ....., 90 L.ed. (Adv. Op.) 1178, proof of a series of distinct conspiracies will not sustain the charge of a single conspiracy made by this indictment. Before this indictment can be sustained against

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13. See Appendix B and the Government's summary of the testimony of Figone, Cernusco, Vogel and Duffy.

this petitioner, it must not only be inferred that he knew and agreed with Abel, Blumenthal and Feigenbaum to sell whiskey at a price over the established ceiling, but it must be inferred that Abel, Blumenthal and Feigenbaum knew each other and *agreed not only with this petitioner but with each other* to sell this whiskey over the ceiling, and that this petitioner knew of and joined the agreement they made among themselves. The *Falcone* and *Kotteakos Cases* require this. The record is utterly devoid of any evidence to support such inferences.

And still this is not all. To sustain the conviction of this petitioner not only must it be found that each of the necessary inferences can be drawn, with no better foundation than a prior speculation, but it must be found that all of this is so clear that each and the ultimate inference of guilt appear *beyond a reasonable doubt* (see the *Mortensen* and *American Tobacco Co. Cases* in Part III-2 of the foregoing petition). The record must be such that suspicion or conjecture has not been permitted to take the place of evidence, for "guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had." (*Dahly v. United States*, 50 Fed.2d 37, 43 (C.C.A. 8)). The proof of a conspiracy may be circumstantial "but it must be proof." The facts proved "must have a legitimate tendency to compel belief in" guilt and "must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which reasonably may be drawn from them as a whole, must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. This rule applies with

the same force where conspiracy is the charge, as where substantive offenses are in question." (*Kassin v. United States*, 87 F.2d 183, 184 (C.C.A. 5)). If other cases are desired they will be found cited in Part III-2-(e) of the foregoing petition.[14]

It is submitted that even using the Harkins testimony, the circumstantial evidence in this case,—and the evidence relied on to hold this petitioner is only circumstantial,—does not exclude the inference of innocence; it does not exclude the inference that this petitioner was operating a legitimate business in a legitimate way, that he did *not* personally know the arrangements by which the two carloads of whiskey were being handled, that he did *not* know that the whiskey was to be disposed of, and was disposed of, at prices above the fixed ceiling, that he did *not* know the identity of any of the sellers, that he did *not* have any agreement with them and that he did *not* know, if it is the fact, that they had any agreement among themselves or with anyone else. And, for the majority below and for the Government, there is a confounding circumstance that points only to his innocence. The total shipment was 4040 cases. At most only 1575 were sold at prices above the ceiling. If this petitioner were party to any conspiracy why, with the acute demand for whiskey, were

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14. Compare *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 45 L.ed. 361; *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 77 L.ed. 819; *Stevens v. The White City*, 285 U.S. 195, 203, 76 L.ed. 699, 704; *Atchison etc. Co. v. Saxon*, 284 U.S. 458, 76 L.ed. 397; *Atchison etc. Co. v. Toops*, 281 U.S. 351, 74 L.ed. 896; *Northern Ry. Co. v. Page*, 274 U.S. 65, 71 L.ed. 929; *Chicago etc. Co. v. Coogan*, 271 U.S. 472, 70 L.ed. 1041.

the other 2465 cases sold only at the usual price of $24.50, well under the ceiling?[15] How, as to him, does the sale of the 1575 differ from the sale of the 2465?

Extra-judicial statements of an accused, without independent proof of the corpus delicti, will not sustain a conviction.

So far we have assumed that the majority and the Government could rely on the Harkins testimony. Obviously, as to Goldsmith, no conviction can be sustained without this testimony. As to him, it was the heart of the Government's case. Without it the evidence showed no more than a liquor wholesaler buying and disposing of whiskey in the ordinary course of business at proper prices. What corroboration or independent proof, as to him, of the corpus delicti,—of the elements showing *his* guilt,—is there? What independent proof is there that he was not the owner of the whiskey, that he merely cleared it through his books for a fee of $2 per case, that Weiss was his sales manager and that he divided $2 per case with Weiss? Not only is there none, but the essentials are *contradicted* by all the other evidence in the case.[16]

The record evidence is that Goldsmith was the owner of this whiskey. It was shipped to him and paid for by him. Under ordinary rules applicable to shipping documents this was prima facie evidence that he was the owner (R 257; 49 U.S.C.A., Secs. 83, 107-111; *Commercial*

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15. The presumption of innocence of wrongdoing as to matters to which no testimony has been directed does not desert petitioner because a jury's verdict, right or wrong, resolves other matters.

16. The Government's summary of the evidence (Appendix B hereto) is a summary of all the evidence.

Nat. Bk. v. Canal-Louisiana etc. Co., 239 U.S. 520, 60 L.ed. 417). The other evidence shows not that Goldsmith was paid a "commission" of $2 per case but that he made a gross profit of $2.53 per case, the difference between the cost to him of the whiskey laid down in San Francisco and his selling price. There is no evidence confirming the statements attributed to him by Harkins that Weiss was his sales manager or that he divided any part of any profit or commission or whatever it may be called with Weiss.

This fatal weakness in the Government's case is not apparent in its brief below and is not apparent in the opinion of the majority because the admonition of the court below in *Gros v. United States*, 138 Fed.2d 260, 263 (C.C.A. 9 opinion on rehearing), a conspiracy case, that "the evidence (1) other than appellant's confession and admissions, which it contends establishes the conspiracy charge * * * and (2) what portions of appellant's confessions and admissions warrant the inference that a conspiracy existed" be separated was not heeded. Had it been heeded it would be readily apparent that all of the essentials claimed to warrant sinister inferences against this petitioner have no support but uncorroborated extra-judicial statements attributed to him.

If Goldsmith is guilty of conspiracy, the only one of which he can be convicted is that with which he is charged. The corpus delicti of the crime with which he is charged is a conspiracy of which *he* was a member. The corpus delicti cannot be proved by proving some different conspiracy,—some conspiracy of which he was not a member. As to him *his* joinder,—*his* connection and confederation,—was the gist and gravaman of the charge. It could not

be proved by his extra-judicial statements alone. Such statements were not sufficient evidence to sustain a conviction beyond a reasonable doubt without independent proof of the corpus delicti, or independent corroboration. The order of proof is, of course, not material.

This Court in *Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876, recognized the rule that confessions after a crime must be corroborated; "that the corroboration must reach to each element of the corpus delicti"; that "an uncorroborated confession * * * does not as a matter of law establish beyond a reasonable doubt the commission of a crime" under a recognized exception to the normal rule requiring submission to the jury of questions of fact. In *Tabor v. United States*, 152 F.2d 254, 257 (C.C.A. 4), a conspiracy case, a judgment of conviction was reversed because the trial court failed to give effect to the rule. The Court said:

> "The main question to be considered on this appeal is whether there was sufficient independent evidence of the corpus delicti other than through the alleged extra-judicial confession and admissions of the defendant. * * * The necessity for independent corroboration of a confession, of the character of the one here or as to the admissions made after the crime, is clearly recognized by the Supreme Court of the United States in the case of *Warszower v. United States*, 312 U.S. 342, 61 S.Ct. 603, 85 L.ed. 876. A full discussion of the question and a review of a number of decisions will be found in *Forte v. United States*, 68 App. D.C. 111, 94 Fed.2d 236, 127 A.L.R. 1120."

If further authorities are necessary they will be found in Part III-2-(f) of the foregoing petition.

Without independent proof of the corpus delicti, acts or declarations of alleged conspirators cannot be relied on.

Without independent proof of the corpus delicti i.e., of a conspiracy of which petitioner was a party, acts and declarations of alleged co-conspirators were inadmissable against him and are insufficient to sustain a conviction. The proposition is obvious and the cases are cited in Part III-2-(b) of the foregoing petition.

The indictment did not state the offense of conspiracy.

Finally, it is submitted that where every act shown, assuming every inference unfavorable to the petitioner is to be drawn, is one condemned by a specific statute, the Emergency Price Control Act, later in time than the general conspiracy statute, the former occupies the field and there is no room for operation of the general conspiracy statute on the same facts. This is a question which has not been passed upon by this Court. In fairness, we must add that in other cases such convictions have been sustained by lower federal courts.

Upon this point we rest upon the petition. To avoid repetition we do not set out matter contained in the petition and brief on behalf of petitioner Feigenbaum,—we have had the opportunity of knowing what it will say,—and respectfully ask on behalf of this petitioner consideration of the matter which will there be presented.

APPENDIX A

OPINIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,232
Dec. 16, 1946

Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum,

Appellants,

vs.

United States of America,

Appellee.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges.

Bone, Circuit Judge:

OPINION

Appellants appeal from a conviction before a jury upon an indictment charging them, in one count, with the crime of conspiring to violate the Emergency Price Control Act

and Regulations by wilfully selling whisky at over-ceiling prices. Omitting formalities, the indictment reads as follows:

"That Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss, and Albert Feigenbaum, (hereinafter called 'said defendant') at a time and place to said Grand Jurors unknown, did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange, and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of $25.27 per case of twelve bottles, each of said twelve bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Section 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445.

"And the said Grand Jurors, upon their oaths aforesaid, do further charge and present: That in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out, and to effect the object and design and purposes of said conspiracy, combination, confederation, and agreement aforesaid, the hereinafter named defendants did, at the times hereinafter set forth, commit the following overt acts within the Southern Division of the Northern District

of California and within the jurisdiction of this Court: [followed by a recital of alleged overt acts.]"

Appellants assail this indictment on the ground that a conspiracy or agreement to violate a regulation of the Price Administration is specially punishable under the provisions of the Emergency Price Control Act itself as a misdemeanor and therefore cannot be punished as a felony under the general conspiracy statute. They argue that when Congress provided that it should be unlawful to agree to sell or deliver any commodity in violation of any regulation imposed by the Price Administrator, it thereby made a conspiracy to violate a price regulation punishable specially and exclusively as provided in Section 925(b) of the Price Control Act and, therefore, no prosecution would lie under the general conspiracy statute, U.S.C.A. Title 18, Section 88. It is contended that it was the purpose of Congress to do away, in prosecutions under the Price Control Act, with the harsh rule that a conspiracy to commit a misdemeanor is a felony.

The contention lacks merit. The manifest purpose of Congress in enacting the Emergency Price Control Act was to compel compliance with price regulations authorized under the statute. As pointed out in Kraus & Bros. v. United States, 327 U.S. 614, 620, 621, criminal liability attaches to any one who wilfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices. Congress forbade and made punishable an agreement to violate the act, and from this appellants conclude that the conspiracy statute (Title 18 U.S.C.A. 88) was impliedly repealed or superseded by Congress to the extent that it does not apply to

conspiracies to violate the Emergency Price Control Act and regulations promulgated thereunder.

We do not agree with this contention. The conspiracy statute includes as a necessary element the commission of an overt act. There is no mention of the overt act in pursuance of the agreement alluded to in the Emergency Price Control Act and we conclude that there is a clear and striking distinction between the mere agreement punishable as a misdemeanor, and the agreement plus an overt act within the purview of the felony statute.

Prosecutions based upon indictments for conspiracies to violate the Emergency Price Control Act have been upheld in Newman v. United States (CCA-9), 156 F.2d 8; Old Monastery Co. v. United States (CCA-4), 147 F.2d 905; United States v. Renken (D.C. S.C. 1944), 55 F. Supp. 1; United States v. Krupnick (D.C. N.J. 1943), 51 F. Supp. 982; United States v. Armour & Co. of Delaware (D.C. Mass., 1943), 50 F. Supp. 347. Furthermore, there has been a long and consistent recognition that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses, and the power of Congress to separate the two and to affix to each a different penalty is well established. A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See Pinkerton v. United States; American Tobacco Co. v. United States, Supreme Court, both decided June 10, 1946. See also Old Monastery Co. v. United States, supra.

On principle and from these authorities, we hold that a conspiracy to violate the Emergency Price Control Act and regulation promulgated thereunder is indictable as a separate and distinct offense.

There was evidence in this case from which the jury could properly have inferred beyond a reasonable doubt:—That Goldsmith operated a wholesale liquor business in San Francisco, California, known as the Francisco Distributing Company (hereafter called Francisco) and Weiss was his sales manager; that in December of 1943, two carloads of whiskey (the whisky referred to in the indictment) were received and recorded as purchased by Francisco though exactly who owned the whisky was not established; that this whisky was cased in cases of twelve bottles, each bottle containing one-fifth gallon; that during the months of December of 1943 and January of 1944, and while this whisky was held by Francisco, Abel, Blumenthal and Feigenbaum personally made sales therefrom of cases of whisky at wholesale to various persons, such sales being in lots of from 25 to 200 cases; that when such sales were made, the facilities of Francisco were thereupon used by them for the purpose of clearing such sales through the books of Francisco with the knowledge and cooperation of Goldsmith and Weiss; that for this particular service Goldsmith and Weiss received two dollars per case which they divided between themselves; that upon the making of such sales by Abel, Blumenthal and Feigenbaum, the whisky was invoiced and billed to each of their customers by Francisco and delivery effected to these customers through Francisco; that such invoices were required by state law to be issued from a legitimate wholesale liquor firm so that their records, as purchasers of whisky, could be properly kept to comply with this law; that Abel, Blumenthal and Feigenbaum were not engaged in business as wholesale liquor dealers and none of them held a basic permit as a wholesaler of liquor; that Abel, Blumenthal and Feigenbaum shared in

a common access to the stock or "pool" of whisky so held by Francisco, and each of them was free to and did make sales therefrom to liquor vendors and the liquor so sold by them was thereafter delivered to their customers through Francisco; that in each of these sales the liquor was billed to customers of Abel, Blumenthal and Feigenbaum by Francisco at $24.50 per case and checks for this amount were given to Francisco; that in each sale so made by Abel, Blumenthal and Feigenbaum, each of them demanded and received a side-money payment from the customer to whom they sold whisky, which side-money payment, when added to the ostensible sale price of $24.50 per case, brought the price to these customers of Abel, Blumenthal and Feigenbaum within the range $55-$65 per case; that when the checks to Francisco were cleared through its books and the side-money payments collected by Abel, Blumenthal and Feigenbaum, the whisky was delivered by Francisco to these purchasers; that under the Emergency Price Control Act and applicable regulations the authorized wholesale ceiling price on this whiskey was $25.27 per case at the time these sales were made in the months of December of 1943 and January of 1944.

Appellants vigorously contend that while certain overt acts were shown by the evidence, which might have indicated isolated offenses by individual appellants and punishable as such under the Price Control Act, the evidence was insufficient to show a conspiracy on the part of appellants to commit such offenses. They argue that even though the evidence may have established to the satisfaction of the jury, beyond a reasonable doubt, the truth of the facts as outlined above, nevertheless this proof falls short of creating the necessary inference of guilt

legally sufficient to link appellants together as conspirators who had agreed together on a common plan or purpose to do the things shown by the evidence and thereafter engaged in acts designed and intended to carry this plan into execution; that this evidence failed to show (except in some instances) that appellants were acquainted with one another; that it showed only an identity of results rather than an identity of purpose and the latter must be shown in order to establish the existence of a conspiracy; that while Abel, Blumenthal and Feigenbaum were all conducting the same kind of transaction, no connection was shown between them other than that Goldsmith was the central distributing point from which the whisky was procured; that the independent sales shown to have been made by Abel, Blumenthal and Feigenbaum (and by certain other unknown and unnamed salesmen whose transactions were made to appear in the evidence) present a situation identical to that presented in United States v. Kotteakus, (decided June 10, 1946, Supreme Court) in that the evidence showed several distinct transactions participated in by separate and distinct parties, the only "nexus" among them being in the fact that Goldsmith participated in all.

We cannot agree with these contentions. If the jury was convinced beyond a reasonable doubt that the facts and circumstances revealed by the evidence were true, then the jury was justified in inferring that appellants were parties to a single agreement and conspiracy to commit the offenses charged in the indictment and that the overt acts established in the evidence were done and performed by appellants to further and carry into execution the objects and purposes of this conspiracy.

It is true, as argued, that when one conspiracy is charged, proof showing only different and disconnected smaller ones will not sustain conviction, and proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, will not sustain conviction. But, as herein indicated, the jury in this case was not confronted with that sort of situation. Here the evidence tended to prove, not a multitude of isolated conspiracies but a single general conspiracy in which the accused cooperated toward the same common end.

Appellants contend that the lower court erred in admitting in evidence certain sales of whisky by Abel, Blumenthal and Feigenbaum to purchasers from them, without first having proved that appellants took part in a conspiracy, that is, until the corpus delecti was proved. But the corpus delicti itself may be shown to exist by overt acts such as an exchange of words, circumstances and events showing a course of dealings. Any or all of these may provide the basis from which the existence of the conspiracy might be inferred by the jury. Commission of the overt acts may constitute the best proof of the conspiracy and such evidence is often used for that purpose.[1]

An overt act need not be in itself a criminal act,[2] nor

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[1]Marino v. U. S., 91 F.2d 691, 698, 9-CCA., cert. den. 302 U.S. 764; Stack v. U. S., 27 F.2d 16, 17, 9-CCA; Fisher v. U. S., 2 F.2d 843, 846; Hoeppel v. U. S., 85 F.2d 237, 242; Rose v. U. S., 149 F.2d 755, 759, 9-CCA; American Tobacco Co. v. U. S., 147 F.2d 93, 107; Glasser v. U. S., 315 U.S. 60; American Tobacco Co. v U. S., (Supreme Court) decided June 10, 1946; McDonald v. U. S., 133 F.2d 23.

[2]Rose v. U. S., supra; U. S. v. Rabinowich, supra; Marino v. U. S., supra (see note 10 in case).

the very crime that is the object of the conspiracy. United States v. Rabinowich, 238 U.S. 78, 86; Pierce v. United States, 252 U.S. 239, 244. It is sufficient that the overt act should accompany or follow the agreement and it must be done in furtherance of the object of it. See Marino v. United States, supra, notes 12 and 13 in reported case.

In this case the Government relied on circumstantial evidence to show the existence of the conspiracy. The claimed offense is one which from its very nature can rarely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact conspiracy may be proved by circumstantial evidence. Rose v. United States, supra. To constitute an unlawful conspiracy no formal agreement is necessary. Lawlor v. Loewe, 235 U.S. 522; American Tobacco v. United States (Supreme Court, footnote 1). The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. Pearlman v. United States, 20 F.2d 113, 114 (cert. den. 275 U.S. 549); Oliver v. United States, 121 F.2d 245, 249; American Tobacco v. United States, 147 F.2d 93, 107. The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. Rose v. United States, supra.

Here the circumstances support the inference of a common design. The transaction was coherent, followed by a consistent pattern, and extended over a relatively brief period of time. It involved quite simply the acquisition of a single large lot of whisky and its sale ostensibly at a uniform below-ceiling price per case to be paid by check,

plus the exaction in cash of side-payments as heavy as the traffic would bear; hence the use of solicitors in what was peculiarly a seller's market. Each of the accused men appears as a cog in an enterprise bearing throughout the earmarks of a premeditated scheme in which each actor was to play his appointed role. Superficially all is made to appear regular while beneath the surface the law is flouted to the profit of the participants. To say that there is here no evidence of a conspiracy among the several actors is to deny the lessons of experience.

Furthermore, the order in which evidence to prove the corpus delicti is to be received is largely a matter within the discretion of the trial court. The logical sequence of events—from agreement in a common purpose to perpetuation of an act designed to carry it out—does not require that introduction of the evidence must follow the same rigorous sequence. As pointed out above, commission of an overt act may, in itself, constitute the best proof of the conspiracy. The rule in this circuit is clearly indicated in Stack v. United States, supra; Marino v. United States, supra; Rose v. United States, supra and Gros. v. United States, 138 F.2d 261. See also Hoeppel v. United States, supra and McDonald v. United States, 133 F.2d 23.

Appellants also contend that the lawful and proper wholesale ceiling price of the whisky was not established by the evidence. They challenge the application at the trial of Maximum Price Regulation 193, Order No. 5 thereunder, and Maximum Price Regulation 445 to determine the lawful wholesale ceiling price of $25.37 per case on the whisky sold by appellants, and they further contend that Maximum Price Regulation 445 has no application because it was not in effect at the time of the sales.

These contentions are without merit. We find that Maximum Price Regulation 445 was in effect during all of the period covered by the charge in the indictment. Further, that the formula prescribed and required to be applied under these regulations to determine the proper and lawful wholesale ceiling price of $25.27 per case was clearly expressed by the Price Administrator and the dividing line between unlawful evasion and lawful action was not left to conjecture. The lawful price can be clearly ascertained from the regulations and it was properly applied by the lower court in its instructions to the jury.

It is also urged by appellants that these regulations are void because their requirements are so vague, indefinite and uncertain that the wit of man is incapable of understanding them. We disagree. The challenged regulations are free from the claimed infirmities. It is significant that the records required to be kept on sales of whisky referred to in the indictment were made to show an invoiced wholesale price (not including the illegally collected "side-payments") of $24.50 per case. The adoption and use of this "wholesale price" on such sales records revealed a knowledge and understanding of the wholesale price requirements of the applicable regulations sufficient to present to the jury a clear inference that the studied purpose of the appellant-sellers was to make this invoice price come within the lawful wholesale ceiling price of $25.27 per case in order that such recorded sales would appear to conform to the price requirements of the very regulations and the order which appellants here characterize and denounce as being so vague and uncertain as to be incomprehensible.

Appellants also assert the invalidity of the regulations. The same argument was asserted in Old Monastery v. United States, supra. The same regulations were there involved and the court found no merit in the contention. The Yakus case (321 U.S. 414) lays at rest the question of appellants' right to attack the validity of such regulations in this proceeding. There is an adequate separate procedure available for the adjudication of the validity of administrative regulations when questioned, even in criminal cases. The record shows no attempt by appellants to employ the procedure referred to in the Yakus case, and in view of the rule there laid down, we hold that appellants' challenge to the validity of the regulations and Order No. 5 cannot here be considered.

The contention that the evidence showed that appellants who sold the whisky were "finders" for the purchasers is without merit. The evidence clearly permitted a convincing inference to the contrary and it satisfied the jury, beyond a reasonable doubt, that where sales were established as having been made by Abel, Blumenthal and Feigenbaum to certain buyers from them, they were sellers in these transactions and not "buying agents" for these purchasers.

One Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department, testified concerning the details of an interview he had with Goldsmith and his sales manager, Weiss, during January of 1944. (Harkins appears to have had a later interview with these two appellants in September of 1944 regarding the same matter). He had been checking on the sales of the whisky here involved. In these conversations, these appellants

told Harkins of the receipt by them of the two carloads of whisky and stated to him that they had received a fee of $2 a case for clearing the whisky through the books of the Francisco.

Objection was made by appellants to the Harkins testimony on the ground that it was not binding on any of them except Goldsmith and Weiss; that the September interview was after the conclusion of the alleged conspiracy and was a narrative of past events; that it was hearsay, and that the corpus delicti had not been established. At the conclusion of the testimony, the court instructed the jury that the statements made by Goldsmith and Weiss to Harkins could only be considered as against Goldsmith and Weiss. The instruction was proper. Chevillard v. United States, 155 F. 2d 929, 9-CCA.

Aside from the Harkins testimony directly affecting the activities of Goldsmith and Weiss, there was ample evidence of active participation in the conspiracy charged to sustain, beyond a reasonable doubt, an inference of guilt of Abel, Blumenthal and Feigenbaum, the other three appellants. This evidence also fully sustains the inference that the sales of whisky by Abel, Blumenthal and Feigenbaum were made by them and delivery to their customers accomplished by means of the cooperation and participation of Goldsmith and Weiss in this sales scheme. Such a conclusion is clearly supported by reasonable inferences to be drawn from the evidence.

Another contention is that since the court below admitted the testimony of each witness against only a particular defendant with whom he dealt, and awaited the motion of the Government at the close of its case to admit

all of the testimony against all of the defendants[3] upon the ground that a conspiracy had been established among them, they were deprived of the right of cross-examination—this because they could not cross-examine at the time of such limited admission without waiving its limitation. They argue that this situation gave them no opportunity to cross-examine later in the trial and prior to the granting of the Government's motion. The record does not support them in this contention. Their objections at trial reveal no protest against a deprivation of the claimed right. No demand to cross-examine was made at the time of the granting of the Government's motion. See Levine v. United States, 79 F. 2d 364, 368, 9 CCA.

An exception was noted by appellants to that portion of the charge to the jury which informed the jury that in every crime there must exist a union or joint operation of act and intent, and for conviction both elements must be proved to a moral certainty and beyond a reasonable doubt; that such intent is merely the purpose or willingness to commit such an act; that a person is presumed to intend to do all that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of all his acts.

We find nothing objectionable in this instruction. See United States v. General Motors, 121 F. 2d 376, at 402; Gates v. United States, 122 F. 2d 571, 575.

We have examined this record with care to assure ourselves that substantial rights of appellants (who did not testify) have not been invaded by the wrongful admis-

[3]This motion was granted except with respect to the testimony of Harkins which was admitted only against Goldsmith and Weiss.

sion of evidence and by the instructions to the jury. The instructions adequately informed the jury concerning the weight to be given circumstantial evidence and the necessity of receiving with caution the testimony of an accomplice or co-conspirator; the quantum and character of proof necessary to establish the existence of a conspiracy; the element of reasonable doubt regarding the guilt of any one of the appellants, and the necessity of applying the rule of reasonable doubt to every material element of the events charged in the indictment. The rule of proof as to the establishment of the commission of overt acts was properly stated. From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury.

The evidence admitted in this case supports the verdict. It convinced the jury beyond a reasonable doubt that appellants were active participants in a single conspiracy the purpose and result of which was the deliberate use of the black-market side-payment device to violate the Emergency Price Control Act.

Affirmed.

(Endorsed:) Opinion. Filed Dec. 16, 1946. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,232

Harry Blumenthal, Louis Abel, Lawrence B. Goldsmith, Samuel S. Weiss and Albert Feigenbaum,

Appellants,

vs.

United States of America,

Appellee.

ORDER ON PETITION FOR REHEARING

Before: Denman, Healy and Bone, Circuit Judges

The petition for rehearing is denied.

WILLIAM HEALY,
United States Circuit Judge.

HOMER T. BONE,
United States Circuit Judge.

Denman, Circuit Judge, dissenting:

The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the court's opinion filed on December 16, 1946.

(Endorsed:) Order denying petition for rehearing, and Dissenting Memorandum of Denman, CJ. Filed February 28, 1947. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DISSENTING OPINION

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division

Before: Denman, Healy and Bone, Circuit Judges Denman, Circuit Judge, dissenting from opinion of the court filed herein on December 16, 1946.

The statement of facts of the court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.

Abel, Blumenthal and Feigenbaum are shown to have been black marketeers and should have been prosecuted for selling whisky at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. Kotteakos v. United States, 328 U.S. . . , 90 L. Ed. 1178, 1183.

The court's opinion is bare of facts, as is the evidence,

(1) That any of these three knew or was in any communication with any others of them;

(2) That any knew that any other obtained whisky from the defendants Goldsmith and Weiss;

(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called "common pool" of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey

from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

(4) That any knew that any other bought his whiskey at the same below-ceiling price;

(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and Feigenbaum separately as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them.

The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of Kotteakos v. United States, 328 U.S. . ., 90 L. Ed. 1178, 1181, and Cañella v. United States, 157 F. 2d 470, 477.

Even if the circumstantial evidence of identity of purchase and sale price also warranted the more remote inference that each of these three sellers conspired with each other and the owner to violate the price ceiling, the first and obvious inference, of three separate agencies for the owner, must control. As we stated in reversing an instruction which failed to state that the inferences from circumstantial evidence must be "inconsistent with every reasonable hypothesis of innocence," of the crime charged. Paddock v. United States, (CCA-9) 79 F. 2d 872, 875, 876

"These instructions were erroneous. The rule with reference to the consideration of circumstantial evi-

dence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett Instructions to Juries, § 2491, et seq. We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon,' as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketeers, Abel, Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three or any one of them for such prohibited sales.

There is evidence that Weiss and Goldsmith received $2.00 per case to pass the whiskey through their books and to sell it at slightly less than the maximum price to cover up some unknown reason of the unknown owner.

But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the Kotteakos case, not the conspiracy charged in the instant indictment. As in Paddock v. United States, supra, the inference from the circumstantial evidence of these wrongful acts involving sales at less than the maximum is one "inconsistent with . . . [a] reasonable hypothesis of innocence" of the charged conspiracy to sell at higher than the maximum price. As is stated in Kotteakos v. United States, supra, at page 1191,

> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The judgments should have been reversed.

(Endorsed:) Dissenting Opinion of Denman, C.J. Filed February 28, 1947. Paul P. O'Brien, Clerk.

APPENDIX B

(Government's summary of evidence in its brief in the Circuit Court of Appeals for the Ninth Circuit. This is a full copy of the whole summary of the evidence except as noted in the case of witness Nathanson. We have made some additions by footnotes. All footnotes are ours, and do not appear in the Government's brief, except the footnotes for which the numbers 3, 4, and 5 are used a second time and, as noted, these footnotes appear in the Government's brief.)

THE TESTIMONY

Tracing the whiskey and establishing the price.

Almon C. Jones of the United States Internal Revenue Service, Alcohol Tax Unit, produced U. S. Exhibit No. 1, Wholesalers' Basic Permit of L. B. Goldsmith, dba Francisco Distributing Company (showing the appellant Weiss to be a former partner in that company). He further testified that the appellants Weiss, Blumenthal, Abel and Feigenbaum held no wholesaler's basic permits. He also produced U. S. Exhibits Nos. 2 and 3, which are certain forms known as the "52-A forms", the forms on which the wholesaler liquor dealers report the detailed receipt of merchandise. U. S. Exhibit 2[1] recorded the purchase of 2076 cases of whiskey through the Penn Midland Import Company of New Jersey from Ben Burk Inc. U. S. Exhibit No. 3[1] showed the purchase of 1964 cases of whiskey

1. These exhibits also showed all sales made by Francisco, and set out the name and address of each purchaser of each of the 4040 cases of whiskey. The total Old Mr. Boston Rocking Chair Whiskey bought by Francisco was two carloads totaling 4040 cases (R 251, 252, 259). The evidence of purchases over the claimed ceiling price was: Reinburg, 200 cases (R 279, 281), of which Giometti got 50 (R 288, 289); Figone, 200 cases for himself and 75 cases for Avila (R 296, 300); Cernusco for himself, Lewis and Vukota, not more than 300 cases, and possibly

from the Penn Midland Import Company of New Jersey, the distiller being Ben Burk, Inc., or a total of 4040 cases (Tr. pp. 243-250). The railroad car numbers were recorded in these exhibits, and the proper custodian of the freight bills relating to these railroad cars produced them. They were introduced in evidence as U. S. Exhibits Nos. 7 and 8. They showed that the freight on this whiskey, Old Mr. Boston Rocking Chair Whiskey, was 81¢ per case (Tr. p. 250). U. S. Exhibits Nos. 4, 5 and 6 were 52-A records of the Francisco Distributing Company which had been filed through the month of March 1942 to the month of December 1943. They were admitted in evidence for the limited purpose of showing that there were no sales of Old Mr. Boston Rocking Chair Whiskey during this period of time preceding the receipts shown in Government's Exhibits Nos. 2 and 3 (Tr. p. 249).

The whiskey was released through the San Francisco Warehouse Company. *Fred H. Sander* of that company testified that he received his instructions regarding the unloading of the two freight cars from the appellant Weiss, whom he identified.[2] He also produced certain

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only 200 (R 301-310); Taylor and Humes, 100 cases (R 318) and another 100 originally ordered by them that are not accounted for (R 319 et seq.); Vogel, 100 cases (R 347); Duffy, 100 cases (R 348 et seq.); Lombardi, 100 cases (R 333); Fingerhut, 125 cases (R 364, 365); Travis, 175 cases (R 364, 373, 376. Taking the highest figures the total is 1575. There was no showing as to the remaining 2465 cases of the 4040. Yet the name and address of every person to whom any of these 4040 cases were delivered appeared on U. S. Exs. 2 and 3.

If Goldsmith were party to a conspiracy it's remarkable none of these 2465 cases were sold over the ceiling when there was a demand from people who were willing to pay over the ceiling prices (R 283).

2. "I had no dealings whatsoever with the witness (sic) Goldsmith. I had dealings with Mr. Weiss * * *." (R 256)

orders relating to the release of this whiskey,[3] which had been received by him from the appellant Weiss. These latter named documents became Government's Exhibits Nos. 11, 12, 14, and 17 (Tr. pp. 251-263).

Frank Dito, Assistant Cashier and Chief Clerk at the Bank of America, Ninth and Market Branch, San Francisco, produced the signature cards of the Francisco Distributing Company[4] and further produced certain collection records of the Francisco Distributing Company. The witness Dito further testified that the appellant Goldsmith visited the bank with reference to this transaction and paid the draft[5] (Government's Exhibits Nos. 16, 17, 18, 19 and 20) (Tr. pp. 265-268).

Joseph N. Nathanson (Identified himself as a Price Specialist for the OPA. Testified that $19.24 as the distiller's price per case, $.81 as the freight per case and $1.92 as the California tax per case, or a total cost to the wholesaler of $21.97. He fixed the ceiling price as $25.27 by multiplying the wholesaler's cost by 1.15. Since his testimony went to no other point and we are not now questioning $25.27 as the ceiling price we do not set out the summary of his testimony.)

The sale to Dopey Norman's.

Norman Reinburg testified that he operated Dopey Norman's, a saloon and restaurant in Vallejo during the months of December, 1943 and January, 1944; that during

3. That is, orders to the warehouse for shipment from the warehouse to the various buyers.

4. These signature cards were for the Francisco bank account (R 266).

5. Goldsmith directed that the drafts be paid and they were paid by being charged to the Francisco account (R 268).

that period of time he made two purchases of Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company (Tr. p. 278). He further testified that the appellant Abel went out of his way two or three times to get the witness Reinburg whiskey, and he couldn't do it because it wasn't a legitimate set up. Both the witness Reinburg and the appellant Abel turned it down, and when the appellant Abel came along with this Francisco Distributing Company, the witness Reinburg accepted it because he had a sale which was correct with the state law (Tr. p. 285). The witness Reinburg had a conversation with the appellant Abel regarding this whiskey early in December; just himself and Mr. Abel were present. All Reinburg talked about was 100 cases of whiskey. Abel wanted to sell him the whiskey. They dickered about the price and finally arrived at a price of $65 per case. Reinburg did not pay any money to Mr. Abel at that time, but later gave him a check for $2450.00 for the first 100 cases of whiskey. The check for $2450.00 was payable to the Francisco Distributing Company. After Abel gave the witness Reinburg the bill, an invoice of the Francisco Distributing Company, December 17, 1943, which priced the whiskey at $24.50 per case (U. S. Exhibit No. 22); he gave Abel the rest of the money in cash, which totalled $6500.00 for the first 100 cases (Tr. pp. 279-281).

Reinburg further testified that he made a second purchase of Old Mr. Boston Rocking Chair Whiskey during the month of December, 1943. He purchased the whiskey from the same people, the same channel, the same amount he paid for that whiskey exactly as the other, $2450 by check and the rest by cash. It totalled $65.00 per case. He had the same conversation as before regarding this

transaction (Tr. p. 281). "The conversation was the same thing, the 100 cases for the same price. Mr. Abel said the same as he did on the first 100 cases, repeated the same thing. Abel wanted to sell me 100 cases of whiskey, and I wanted to buy 100 cases of whiskey. The price was $2,450 by check, which was the ceiling price. I gave him the check; I got my bill, and when I got my bill I gave him the rest of the money totalling $65.00 for each case. The rest of the money was paid by cash; that cash was delivered to Mr. Abel." (Tr. p. 281). The second sale was covered by the invoice of the Francisco Distributing Company, No. 10140, U. S. Exhibit No. 23, which priced the whiskey as $24.50 per case.

"During this period of time I traveled to San Francisco with Mr. Abel on two occasions. The first occasion was about the 6th or 7th of December. I took Mr. Abel with me in my car. I took him in the down-town section here about three or four blocks off Market, around Third or Fourth.[6] The place was a jewelry store pawn shop, sports goods. I let Mr. Abel off at this sports goods shop. I had a conversation that I would pick him up there in half an hour. I drove down there on the date of the first trip at Mr. Abel's direction." (Tr. p. 282). * * * "I made a second trip to San Francisco with Mr. Abel about the 16th or 17th of December. I traveled to San Francisco the same way, in my car. I took him to the same section of the city, about three blocks off Market, about Third Street there.[6] I observed Mr. Abel going into this pawn shop and this sport shop which I named. * * *" (Tr. pp. 282-283).

6. The Francisco place of business was on Tenth Street.

The witness Reinburg further testified that he was anxious to have the whiskey; that he would not accept any whiskey unless there was an invoice, that he wanted to be sure he was dealing with a legitimate house, a legitimate distributor. He testified: "You can buy whiskey off a truck on the street or anything like that. I wanted to buy the whiskey through a legitimate place of business." (Tr. pp. 315-316).

The sale to Giometti.

John Giometti testified that he was a tavern keeper at Vallejo, California. During the month of December, 1943 to January, 1944, he purchased 50 cases of Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company at $65 per case. He had given a cashier's check payable to the Francisco Distributing Company to Reinburg, the preceding witness. When the whiskey was delivered, he received with it the invoice of the Francisco Distributing Company, No. 10171, pricing the whiskey at $24.50 per case (U. S. Exhibit No. 24) (Tr. pp. 288-289). At this time the witness Giometti gave Reinburg the balance of $2025 to make the total of $65 per case.

Later the witness Giometti had a conversation with the appellant Abel regarding this transaction (Tr. p. 290). The appellant Abel said he could get the witness Giometti some whiskey if Giometti wanted it. The appellant Abel said the whiskey that the witness Giometti got at the Francisco Distributing Company went through his hands, and he could get the same deal. Appellant Abel said he just took the money that the witness Giometti gave Reinburg and took it to the "big shot"; and gave Giometti the figure of $60 per case. The witness Giometti "didn't

go for it no more" because he figured he was paying too much for it in the first place, and didn't think he would get a legitimate sale. Appellant Abel did not say who the "Big Shot" was, he said the "Big Shot" was in San Francisco (Tr. p. 291).

The sale to Figone and Avila.

Victor Figone testified that he owned a saloon in El Cerrito. During the month of December, 1943, he made a purchase of Old Mr. Boston Rocking Chair Whiskey from some gentleman in the Francisco Distributing Company[7] (Tr. p. 295). The witness Figone got 200 cases for himself, and ordered 75 cases for Mr. Avila. The witness Figone further testified that he did not see that man he spoke to present in the court room[7] (Tr. p. 296). At that time whiskey was hard to get, so you just had to go out to work to buy whiskey.

On Figone's second visit to the Francisco Distributing Company[7] he took a check for his whiskey in the amount of $4900 and a check for Avila's whiskey, both payable to the Francisco Distributing Company (Tr. p. 297). The fellow he talked to there[7] told him to make out the check for $4900 for the 200 cases, and to bring over the other in cash, around $5100, to make up a balance of $60 a case. After he received the whiskey, the invoice of the Fran-

7. Figone testified that he understood the man's name was Weiss. He was cross examined by Weiss, who was acting as his own counsel, and was unable to identify him as the man. "I do not see that man here in the court room. I have been looking here the last day or so. I have been here both days. I don't seem to see him" (R. 296). On cross-examination by Weiss: "Like I say, I have been looking yesterday and today, and this man I dealt with was a short stout fellow. That man told me he was Mr. Weiss. I would recognize him if he was in this court room but he is not in here" (R 299). Want of identification was conceded (R 414).

cisco Distributing Company, No. 10145 (which priced the whiskey at $24.50 per case—U. S. Exhibit No. 26), was mailed to him "paid" (Tr. p. 298).

Melvin Avila testified that he owned a tavern in El Cerrito; that during the months of December, 1943 or January, 1944, he purchased 75 cases of Old Mr. Boston Rocking Chair Whiskey at $60 per case. Payment was made by some odd $1800 in a check payable to the Francisco Distributing Company, the rest by cash. He delivered the check and the cash to Figone (the preceding witness). All of his dealings were with Figone. Subsequently he received the whiskey, and the invoice of the Francisco Distributing Company arrived by mail (Tr. pp. 300-301).

The sales to Cernusco, Vukota and Lewis.

James Cernusco testified that he was in the tavern business in San Francisco during December, 1943, and January, 1944, when he purchased some Old Mr. Boston Rocking Chair Whiskey from the Francisco Distributing Company. He intended to buy some for himself and for two friends of his (Tr. p. 301), Vukota and Lewis, whose places of business were in Livermore; that he made that purchase at his place of business from a man who gave his name as "Weiss, or Wise, or something"; that he did not see the man he saw then in the court room.[8]

The witness Cernusco further testified that the man who said he was from the Francisco Distributing Company went to the witness Cernusco's place of business. They drove up Mission Street up to Third Street between Mission and Market.[9] The man got out, seemed to walk

8. "I do not see the man that I saw then here in the court room. I have been here for a couple of days, since yesterday, and today, and I have not seen him yet" (R 302). Want of identification was conceded (R 414).

9. See footnote 6.

across the street there. Cernusco did not know whether he went into the Sportorium, or not (Tr. p. 302). The witness Cernusco testified that he had given a check for $2000 payable to the Francisco Distributing Company which he had received from Vukota, to the man early in December (U.S. Exhibit No. 28); that he gave the man Vukota's check for $450 payable to the Francisco Distributing Company (U.S. Exhibit No. 29) on the day of the ride along Third Street. (Tr. p. 303). The witness Cernusco further testified that he had, earlier in December, given a check for $2000 payable to the Francisco Distributing Company (U.S. Exhibit No. 31) which he had received from Mr. Lewis, to this man, and on this later occasion he gave Lewis' check for $450 payable to the Francisco Distributing Company (U.S. Exhibit No. 30) to the man who said he was the salesman.[3] At that time Cernusco gave the man who said he was the salesman $6100 in cash. The man told Cernusco that the whiskey was in the San Francisco warehouse (Tr. pp. 304-305). They drove to the warehouse on Townsend Street. Cernusco was given two invoices of the Francisco Distributing Company (U.S. Exhibit No. 32, and U.S. Exhibit No. 33) (Tr. p. 306); he gave the former to Lewis and the latter to Vukota the next day at Livermore. These invoices priced the whiskey at $24.50 per case (Tr. p. 307).

John E. Vukota, a tavern owner at Livermore, California, identified the two checks made by him and given to Cernusco, and the invoice received from Cernusco. Vukota

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3. It was stipulated later in the trial that each of these checks, U. S. Exhibit No. 28, U. S. Exhibit No. 29, U. S. Exhibit No. 30 and U. S. Exhibit No. 31, bore the endorsement stamp of the Francisco Distributing Company, which was made by the Francisco Distributing Company (Tr. p. 334). (This footnote appears in the Government's brief.)

testified that at the time he gave the check for $450 to Cernusco, he gave Cernusco $3050 in cash. Vukota testified that he received 100 cases of Old Mr. Boston Rocking Chair Whiskey a day or so after he received the invoice, about the first week of January, 1944 (Tr. pp. 308-309).

V. M. Lewis, a tavern owner at Livermore, California, identified the two checks made by him and given to Cernusco and the invoice of the Francisco Distributing Company received by him (Tr. pp. 309-310).

The sale to the Taylors and Mr. Humes.

Mr. Taylor testified that during December, 1943, and January, 1944, he was operating "Ponty's" pool place as a liquor establishment and bar, for which he and Mr. Humes held the license. During the month of December he made a purchase of Old Mr. Boston Rocking Chair Whiskey from the appellant Feigenbaum at a drugstore on Mission Street. Prior to his first conversation with Mr. Feigenbaum he had given a $500 deposit on this whiskey to a man named "Little Joe", whom he met at a bar.

When he first saw Feigenbaum, in the presence of his wife and Mr. Humes, Feigenbaum said that if he had not shown up he would have lost that $500. Feigenbaum told them the price of the whiskey would be $64 and wanted them to take 200 cases. Eventually, they took 100 cases instead of the 200. At the time of the first conversation Feigenbaum had Taylor's wife make out a check payable to the Francisco Distributing Company in the amount of $4900 (U.S. Exhibit No. 34). In addition to the check for $4900, Taylor gave Feigenbaum $1050 in cash.

Taylor returned to San Francisco on December 23rd and visited the Sunset Drug Company, where he had

another conversation with Mr. Feigenbaum. At that conversation Feigenbaum told him the name of the whiskey was the Old Rocking Chair and sold him one case of whiskey for $64 in cash. Taylor then told him that he would take the 100 cases and Feigenbaum made out a check to Taylor in the amount of $2450. Feigenbaum asked Taylor to endorse the check so that would put him in the clear. That gave Taylor just the 100 cases for $64 a case. Taylor did not receive any cash for the $2450 check when he endorsed it (Tr. pp. 316-322).

Mrs. Taylor testified that she had made out the check to the Francisco Distributing Company for $4900 on December 9, 1943, in the Sunset Drugstore, in the presence of her husband, Mr. Taylor, Mr. Humes, Mr. Feigenbaum, and a man named Mr. Tucker, and another fellow they called Little Joe; that she wrote that check at Feigenbaum's instruction. He told her to make the check payable to the Francisco Distributing Company for $4900. She further testified that she had given her husband $1000 in hundred dollar and fifty dollar bills (Tr. p. 330).

Raymond C. Humes testified that he was a partner in the operation of Ponty's Place, a saloon in Cottonwood; that in December, 1943, he made a trip to San Francisco with Mr. Taylor to see if they could get some whiskey. They met a Mr. Tucker, who introduced them to Little Joe. They placed a $500 deposit with Little Joe who said he thought he could get them some whiskey, which would cost around $64 (Tr. pp. 332-333). After giving the deposit he and Mrs. Taylor returned to Cottonwood and the two of them made a return trip to San Francisco with Mrs. Taylor; that was around the 8th or 9th of the month. They

went to the Sunset Drugstore, where Little Joe introduced them to Feigenbaum (Tr. p. 333). Feigenbaum said he would get them 100 cases of whiskey for $64 a case, and he would have to have a check for it for $24.50 a case (Tr. p. 334). Mr. Feigenbaum wanted to know if they could not take 200 cases. They were to make out the check for 200, which was $4900. Feigenbaum was paid an amount of money for the freight in addition to the $500 deposit, and the check for $4900. He was paid the further amount of $1050 by Mr. Taylor in Mr. Humes' presence. Mr. Feigenbaum then said he wanted a check for $24.50. He said that went to the distributor (Tr. p. 335). Mr. Humes further testified that he received the invoice of the Francisco Distributing Company, No. 10091. This invoice prices the whiskey as $24.50 per case (U.S. Exhibit No. 35).

The sale to Walter J. Vogel.

Mr. Vogel testified that he owned the "Toreador Club" during December of 1943 and January, 1944; that he bought some Old Mr. Boston Rocking Chair Whiskey in fifths from the San Francisco Liquor Company at his place of business. A man[10] came in and asked him if he could take 100 cases of whiskey (Tr. p. 345). Vogel paid $59 a case for the whiskey. The man told him to make out the check to the Francisco Distributing Company for $2450 (Government Exhibit No. 45). When the man brought Vogel the invoice of the Francisco Distributing Company, No. 10092 (Government's Exhibit No. 46), Vogel paid him $3400 in cash (Tr. p. 347).

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10. "I don't know the man" (R 345)

The sale to Francis Duffy.

Duffy testified that he was in the tavern business during December 1943 and January 1944, in Daly City; that Government's Exhibit No. 47, a check to the Francisco Distributing Company for the sum of $2000, was written by him, but the name of the Francisco Distributing Company was put in by the fellow[11] with whom he made the transaction (Tr. pp. 348-349); that Government's Exhibit No. 48, a check in the amount of $450, payable to the Francisco Distributing Company, was written the same as the other one (Tr. p. 349); that he gave this man $2000 in cash at the time he gave him the check for $450. Government's Exhibit No. 49, an invoice of the Francisco Distributing Company (showing a price of $24.50 per case) came into his possession a few days after he picked up the merchandise on the 22nd of December, 1943.

The sale to Angelo Lombardi.

Angelo Lombardi testified that he was a tavern owner in Santa Rosa, and that he purchased 100 cases of Old Mr. Boston Rocking Chair Whiskey; that he paid cash for the whiskey to a fellow in the Sportorium on Third Street, whom he identified as the appellant Blumenthal; that he paid $3050 in cash to Mr. Blumenthal. Mr. Minkler, a tavern owner in Santa Rosa, contacted him about the whiskey; they went to San Francisco to the Sportorium. Mr. Lombardi went into the Sportorium, Mr. Minkler went into the back room there. On that occasion Mr. Lombardi did not have any conversation with Blumenthal.

11. "I have looked around and haven't been able to see this man in the court for two days now" (R 350): Want of identification was conceded (R 414).

After Mr. Minkler came out of this room he said they got in contact with somebody and the whiskey was O.K.; then Minkler and Lombardi went back to Santa Rosa.

Around the 20th of December, Lombardi and Minkler returned to San Francisco and went to the Sportorium with $3050 in cash. On that occasion Lombardi saw Blumenthal at the Sportorium. All three of them went together in the back room and paid the money to Mr. Blumenthal, laid it right on the shelf. 100 cases of whiskey arrived by Sonoma-Marin Freight Company. Lombardi testified that it was his signature on the check for $2450 shown him; that he wrote the check out and delivered it to the name on there, Clyde Minkler, at the instruction of Minkler (U.S. Exhibit No. 50) (Tr. pp. 353-355). The invoice of the Francisco Distributing Company, No. 10147-A (which priced the whiskey at $24.50 per case) (U.S. Exhibit 51), came in about the first of January in the mail. The words "Salesman Weiss" were on there when Lombardi received the document[12] (Tr. p. 356).

The sale to Fingerhut and Travis.

Herman Fingerhut testified that he owned a tavern in Vallejo and purchased some Old Mr. Boston Rocking Chair Whiskey; that the place where he purchased this whiskey was the Sportorium; that he paid $55 a case for this whiskey; that he did not know the man's name, but that he looked similar to the appellant Blumenthal. On the occasion of his first visit to the Sportorium he had a conversation with that man. Fingerhut told him he needed some whiskey and the man told him he could probably get it for him (Tr. p. 362). Fingerhut said he could use

12. Who wrote these words does not appear.

around 200 cases. The man said, well, he could take care of him. He told him (Fingerhut) the price was $55. Fingerhut had to pay $24.50 a case for that, and the rest was in cash.

The first check Fingerhut made out was for $2000. This was on his second visit to the Sportorium (Tr. p. 363). On the second visit Fingerhut went to the Sportorium on Third and Stevenson. The Sportorium is one short block away from Market Street; it's right on the corner of Stevenson and Third (Tr. p. 363). On this second visit to the Sportorium Fingerhut saw Mr. Blumenthal. He had a conversation in the back of the Sportorium and told him, Blumenthal, that he could only take 100 cases but knew somebody who would take the other 100 cases. The other party was a man by the name of Walter Travis. Blumenthal told him the whiskey was going to arrive about the end of the month. Fingerhut gave Blumenthal a deposit on it of $4000 in the form of four $1000 bills (Tr. p. 364).

A few days later Travis and the witness Fingerhut went to the Sportorium and the witness said he would take 100 and Travis 100. Blumenthal told Fingerhut to make out a check for $2000 to the Francisco Distributing Company. The 100 cases of whiskey were delivered to Fingerhut; that was Old Mr. Boston Rocking Chair Whiskey. The invoice of the Francisco Distributing Company (Government's Exhibit 52), came into Fingerhut's possession from the man at the Sportorium, where he got the whiskey. Fingerhut paid the balance of $450 in a check to the Francisco Distributing Company.

Fingerhut later purchased another 25 cases of Old Mr. Boston Rocking Chair Whiskey at the same place and

from the same man (Tr. p. 365) for $55 a case, together with 75 cases that Travis got. Travis gave the witness Fingerhut an invoice of the Francisco Distributing Company, No. 10151 (Government's Exhibit No. 53). Fingerhut gave his money to Travis for this latter purchase. Fingerhut talked with Mr. Blumenthal about buying 25 cases; Fingerhut got a telephone call, wanted to know if he needed any more whiskey (Tr. p. 366). On the second purchase Fingerhut wrote out a check for $612, payable to the Francisco Distributing Company and delivered it to Travis, together with cash making the difference between $24.50 and $55 a case for 25 cases (Tr. p. 368).

Walter H. Travis testified that he operated a tavern in Vallejo during the months of December, 1943 and January, 1944; that he purchased 175 cases of Old Mr. Boston Rocking Chair Whiskey from Mr. Blumenthal. On the first occasion he bought 100 cases at $55 a case, writing a check to the Francisco Distributing Company for $2000 (Government's Exhibit No. 44). He was told to make it out to the Francisco Distributing Company by the gentleman at the Sportorium (Tr. p. 373). He testified that he took the check and money to Blumenthal; that he paid Blumenthal $1050 in cash and mailed another check for $450 to the Francisco Distributing Company. On the occasion of Travis' first visit to the Sportorium Blumenthal gave him Government's Exhibit No. 58, an invoice of the Francisco Distributing Company (which shows a price of $24.50 per case), and Blumenthal wrote thereon "Received on account $2000, balance due $450"; that the first cash payment of $2000 he gave to Fingerhut; that later he purchased an additional 75 cases at $55 from Blumen-

thal at the Sportorium and 25 cases for Fingerhut. At that later time the invoice of the Francisco Distributing Company, No. 10152 (Government's Exhibit No. 60) was given to him by Mr. Blumenthal (Tr. p. 376). This invoice shows a price of $24.50 per case.

Testimony of Edward C. Harkins.

Edward C. Harkins testified that he was a Special Investigator for the Alcohol Tax Unit, working on black market cases involving whiskey, and that he investigated this case with the assistance of others. The witness had several conversations with Mr. Goldsmith regarding this case. Early in January, 1944, a conversation took place where Mr. Goldsmith and Mr. Weiss were present (Tr. p. 380). Investigator Gaines of the Alcohol Tax Unit questioned both Mr. Weiss and Mr. Goldsmith regarding various shipments of whiskey. He (Gaines) asked them about these two carloads of Old Mr. Boston Rocking Chair Whiskey, who purchased it, how it was handled. Mr. Weiss, the witness believed, did most of the talking. He said that his firm received $2.00 a case for clearing it through their books; Mr. Goldsmith concurred in that. Mr. Goldsmith and Mr. Weiss both stated that they divided the $2.00, each taking $1. They both stated, agreed, that they did not sell any of the whiskey. It was sold by others and they received the check generally for the payment of the whiskey in advance of the date that they had to take up the sight draft bills of lading. At the time of that conversation they did not tell who actually sold the whiskey (Tr. p. 381).

The witness Harkins further testified that after this conversation he had another conversation with Goldsmith

regarding the facts of this case in September of 1944. The witness Harkins and an investigator of the State Board of Equalization questioned Mr. Goldsmith about who actually brought[13] the whiskey, who owned it, referring to these two carloads of Rocking Chair Whiskey. He said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said "No" (Tr. p. 382). Harkins and the State Board Investigator asked Goldsmith what he received for his share of it and Goldsmith said the Francisco Distributing Company received $2 per case, of which $2 he gave Weiss half, $1.

The witness Harkins further testified that after that time there was another conversation with the appellant Goldsmith at the office of the Alcohol Tax Unit on September 13, 1944, in the presence of Goldsmith's attorney and Mr. Johnson of the Alcohol Tax Unit. Mr. Goldsmith was further questioned about these two shipments of Rocking Chair Whiskey and at that time the witness Harkins showed Goldsmith several invoices that the witness Harkins had in his possession. The Government Exhibit No. 22, the Francisco invoice to The Brig[4], was in the witness Harkins' possession at the time of the interview and the Witness Harkins showed that document to the appellant Goldsmith. Goldsmith stated that he wrote it himself, identifying his handwriting, Government's Exhibit No. 23, a Francisco invoice to The Brig[5], was in the witness Hark-

13. The Record, p. 382, shows "bought" not "brought."

4. This document was identified at the trial by the witness Norman Reinburg. (This footnote appears in the Government's brief.)

5. This document was identified at the trial by the witness Norman Reinburg. (This footnote appears in the Government's brief.)

ins' possession then and there, and Goldsmith identified it as being in his handwriting (Tr. p. 383). Government's Exhibit No. 52, the San Francisco invoice to Fingerhut, was in the witness Harkins' possession, and the witness Harkins showed that document to appellant Goldsmith. Goldsmith stated that he wrote it, except for the notation, "Received on account $2000. Balance due $450.'"[14] The witness Harkins showed Government's Exhibit No. 58, the Francisco invoice to Travis, to the appellant Goldsmith. Goldsmith identified that document as being in his handwriting, all but the notation likewise on this.[14] Goldsmith stated that he wrote most of the invoices; that a few were written by his bookkeeper. On that occasion Harkins had other conversations with him relating to these two carloads. Goldsmith answered that they received $2 per case, and Goldsmith stated at that time, this witness Harkins believed, that up to July 1, 1943 Weiss had been his partner, or on two occasions Harkins believed Goldsmith made the same statement, and that subsequent to July 1st Mr. Weiss was the sales manager, but that Goldsmith felt Weiss was entitled to half the profits and he divided the profits with him, including the $2 per case received on this Rocking Chair Whiskey (Tr. p. 384).

The witness Harkins further testified that he had one conversation later than January 1944 with the appellant Weiss, on May 14th in this building. At that time Mr. Weiss stated that it was true that he received half of the $2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and Weiss finally refused to answer who actually owned the

14. The witness also testified that Goldsmith said he didn't know who wrote it.

whiskey. Weiss said, 'I don't want to involve myself.' Mr. Weiss said he knew Mr. Blumenthal, but he refused to state, to the best of Harkins' recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not (Tr. p. 385).

Upon cross-examination by counsel for the appellant Goldsmith, Harkins stated[15] that he did not recall that Goldsmith told him on this Rocking Chair transaction that he (Goldsmith) had sold the whiskey for $24.50 a case, but Goldsmith said he made $2 a case; that was his profit, and on that profit he gave Weiss $1. That is exactly correct. The whiskey was billed at $19.24; the freight is eighty-one cents, and the State Excise Tax is $1.92 (Tr. p. 387).

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15. The witness also testified on cross-examination: "I remember an expression to the effect that Mr. Gaines said to you 'Mr. Duane, your client is certainly a sap and a sucker.' I remember that there was an expression that he was 'just used.' I remember that you told Mr. Gaines in my presence that I or Mr. Gaines or anybody else would select from the Alcohol Tax Unit any record we have, that Mr. Goldsmith would answer any question he wanted to propound to him, and that the records were open for him. I remember that somebody said to me that there were certain invoices that he would like to have. I remember that you agreed to get the records. I do not know whether or not you subsequently telephoned Mr. Gaines and told him that you had the records in your office. I knew that Mr. Johnson went to your office, but I do not think he got any records. I am under the impression that he looked at your records, but I don't think he took any. He made an examination of them. I wouldn't say that Mr. Goldsmith at no time has refused to give me any document or information that I wanted; he hasn't refused on any documents" (R 386-387).

He also testified when cross-examined by Weiss:

"Q. And didn't you say to me that you were sort of sorry for me?

A. No, I said I felt rather sorry for Mr. Goldsmith, but I didn't understand how a man owning a business could know as little about his business as he professed to know" (R 388)

APPENDIX C

STATUTES

18 U.S.C.A. Sec. 88 (Criminal Code, section 37). Conspiring to Commit Offense against United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096).

50 U.S.C.A. App. Sec. 902. Prices, Rents, and Market and Renting Practices.

(a) Whenever in the judgment of the Price Administrator (provided for in section 201) (section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix), he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix). * * *

(The remainder of section 902 deals with the manner in which the Administrator shall establish maximum prices. Since no question is made on this petition in respect of the ceiling price claimed by the Government to have been established, the remainder of this section is not set out).

50 U.S.C.A. App. Sec. 904. Prohibitions.

(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202(b) or section 205(f) (sections 922(b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing.

50 U.S.C.A. App. Sec. 925. Enforcement.

(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) (section 904(c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.